STATE OF FLORIDA

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Public Service Commission

July 16, 1997

BY AIRBORNE EXPRESS

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street NW, Room 222
Washington, DC 20554

Re: CC Docket No. 96-45 - Federal-State Joint Board on Universal Service

Dear Mr. Caton:

Enclosed please find the original and seventeen copies of Petition of Florida Public Service Commission for Clarification and Reconsideration in the above docket. Please date-stamp one copy and return in the enclosed self-addressed stamped envelope.

Sincerely,

Cynthia Miller
Senior Attorney

CBM:jmb
Enclosure
cc: International Transcription Service

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON D.C. 20554

In the Matter of:	)	
	)	
Federal-State Joint Board on Universal Service.	)	CC DOCKET 96-45
	)	
	)	

FLORIDA PUBLIC SERVICE COMMISSION'S
PETITION FOR CLARIFICATION AND RECONSIDERATION

The Florida Public Service Commission (FPSC) hereby seeks clarification of some portions and reconsideration of some portions of the Federal Communications Commission (FCC) Order, that was adopted May 8, 1997. This petition is filed pursuant to FCC Rule 1.429 (47 CFR 1.429).

(1) **Eligible Telecommunications Carriers**

We believe a full reconsideration of paragraphs 127-198 and Rules 54.201-54.207 is warranted on this item. The FCC has clearly overstepped its authority. The Telecommunications Act of 1996 (the Act) gives the state commissions authority over designation of eligible telecommunication carriers (ETCs). Thus, Section VI - Carriers Eligible for Universal Service Support, should be reconsidered in that the FCC is setting requirements for ETCs. The Order states, "We further conclude that a carrier that offers any of the services designated for universal support, either in whole or in part, over facilities obtained as unbundled network elements pursuant to Section 251(c)(3) satisfies the 'own facilities' request of Section 214(e)." Paragraph 128. Also, the

Order concludes that "states should not designate service areas that are unreasonably large because we recognize, as did the Joint Board, that an unreasonably large service area could increase the scale of operations required of new entrants." The FCC concludes that state designation of an unreasonably large service area could violate Section 253 as a market entry barrier. Paragraph 129.

Then, in Paragraph 139, the FCC concludes that provisions in Section 214(e)(1) and (e)(2) limit state discretion. While we generally may not object to the Order's conclusions, we believe the FCC is not authorized to make legal interpretations relating to state authority in the Act. The Order states:

> "Read together, we find that these provisions dictate that a state commission must designate a common carrier as an eligible carrier if it determines that the carrier has met the requirements of Section 214(e)(1) . . . The statute does not permit this Commission or a state commission to supplement the Section 214(e)(1) criteria that govern a carrier's eligibility to receive federal universal support."

The FCC order adds, in Paragraph 136, that state discretion is further limited by Section 253: "a state's refusal to designate an additional carrier on grounds other than the criteria in Section 214(e) could 'prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service' and may not be 'necessary to preserve universal service.'" The FCC concludes that the statute precludes states from imposing additional eligibility criteria

for ETCs. However, the FCC notes that Section 214(e) does not preclude states from imposing requirements on carriers within their jurisdictions, if these requirements are unrelated to a carrier's eligibility to receive federal universal service funds and are otherwise consistent with federal statutory requirements. Also, the Order acknowledges that a state may establish criteria for the designation of eligible carriers in connection with the operation of that state's universal service mechanism.

Similarly, the FCC rules attached to the order in Subpart C on Carriers Eligible for Universal Service Support stake out a jurisdictional claim for the FCC in this area. Rule 54.201 purports to prescribe to state commission how to designate ETCs. Rule 54.207 addresses service areas.

We believe that the FCC is infringing on state jurisdiction regarding eligible telecommunications carriers. Section 214(e) states plainly: "A state commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the state commission."

"Service area" is defined in the Act as a geographic area established by a state commission for the purposes of determining universal service obligations and support mechanism." The FCC is given only a limited and specific role. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the FCC and the

states, after taking into account recommendations of a Federal-State Joint Board, establish a different definition of service area for such company. The only other FCC role is designation of ETCs for unserved areas. And, then, the FCC determination is only with respect to interstate services.

Section 253 of the Act does not authorize the FCC to make blanket pronouncements and policies, but instead authorizes the FCC on a case-by-case basis to preempt any state statute, regulation or legal requirement that prohibits or has the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications service. This preemption may only occur after the FCC focuses on a particular offending law or regulation, and after notice and an opportunity for public comment on the identified law under review. The FCC is not authorized to conduct a broad-brush preemptive strike against unidentified state authority.

(2) **Legal Framework on Interstate/Intrastate Issues**

We believe the FCC Order has gone beyond the parameters of what the Joint Board recommended. We seek clarification on this matter. The legal framework set forth on interstate/intrastate discounts on the schools and libraries fund and on the high cost fund could create jurisdictional problems for states in the future. While the FPSC may not disagree with the end result and the actual rules, we are concerned with the legal framework. At

a minimum, it should be re-cast and some language in the Order should be deleted.

a. **Recovery of Contributions for High Cost Fund**

Section XIII on Administration of Support Mechanisms should be re-written, or portions simply should be deleted. There is a subsection labeled "Scope of the Commission's Authority over the Universal Service Support Mechanisms." In paragraph 807, the Order states:

> Although we conclude that Section 254 grants the Commission the authority to assess contributions for the universal service support mechanisms for rural, insular and high cost areas and low income consumers from intrastate as well as interstate revenues and to require carriers to seek authority from states to recover a portion of the contribution in intrastate rates, we decline to exercise the full extent of our authority. The decision to decline to exercise the entirety of our authority is intended to promote comity between the federal and state governments and is based on our respect for the states' historical expertise in providing for universal service. (Emphasis added).

Then, in Paragraph 813, the FCC again concludes it has jurisdiction "to require carriers to seek state (and not federal) authority to recover a portion of the contributions in intrastate rates."[1] The FCC correctly notes that state authority to adopt sufficient support mechanisms is restricted only to those

[1] See Competitive Telecommunications Assn. v. FCC, Docket No. 96-304 (Eighth Circuit Court of Appeals, issued June 27, 1997) in which the Court vacated the FCC's attempt to regulate the temporary recovery of access charges for intrastate calls as beyond the scope of the FCC's jurisdiction, pursuant to 47 U.S.C. 152(b).

mechanisms that are consistent with and do not burden the federal mechanisms. Then, the FCC uses the "affordability" standard as their basis of authority to force carriers to get most of their universal service funds from states. We believe this legal leap is flawed.

Again, in Paragraph 816, the FCC establishes the theme:

> Although the states are independently obligated to ensure that support mechanisms are specific, predictable and sufficient and that rates are just, reasonable, and affordable, there is no doubt that the Commission -- with the help of the states -- is to establish in the first instance what services should be supported and what are the necessary mechanisms to do so. This is because the states' authority to adopt sufficient support mechanisms is restricted to only those mechanisms that are consistent with and do not burden the federal mechanisms.
>
> . . . [I]t is reasonable to conclude that Section 254 grants the Commission the primary responsibility and authority to ensure that universal service mechanisms are "specific, predictable and sufficient" to meet the statutory principle of "just, reasonable and affordable rates." The fact that the Commission has this authority does not preclude the Commission from continuing to work with the states to provide for universal service, so long as this partnership results in support mechanisms that comply with the mandates of Section 254.

The Order notes, in Paragraph 817, that Congress recognized that the services supported by universal service support include both intrastate and interstate. "Indeed, the traditional core goal of universal service has been to ensure that basic residential telephone service, which is primarily an intrastate service, is affordable." The FCC concludes, "it is also reasonable that the Commission, in ensuring that the overall

amount of universal service support mechanisms is 'specific, predictable, and sufficient, may also mandate that contributions be based on carriers' provision of intrastate services:"[2]

> "We also conclude that, when we assess contributions based on intrastate as well as interstate revenues, we have the authority to refer carriers to the states to seek authority to recover a portion of their intrastate contributions from intrastate rates." (Emphasis added).

In Paragraph 821, the FCC concludes that "Section 2(b) of the Communications Act is not implicated in this jurisdictional analysis." The FCC says that even when the FCC "exercises jurisdiction to assess contributions for universal service support from intrastate as well as interstate revenues (i.e., for eligible schools and libraries and rural health care providers), such an approach does not constitute rate regulation of those services or regulation of those services so as to violate Section 2(b). Instead, the Commission merely is supporting those services . . ." The FCC also concludes that the "unambiguous language of section 254 overrides Section 2(b)'s otherwise applicable rule of construction." Section 254, according to the FCC, "blurs any perceived bright line between interstate and intrastate matters." (Paragraph 823)

While the FCC says it's premature to assess intrastate revenues now, the Order does set forth a confusing scheme on page

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[2] See Competitive Telecommunications Assn. v. FCC, cited above.

426, often referred to as the 25%-75% split. Beginning on January 1, 1999, the FCC will modify universal service assessments to fund 25% of the difference between cost of service defined by the applicable forward-looking economic cost method less the national benchmark, through a percentage contribution from telecommunication providers based on their interstate end-user telecommunication revenues. Then, in paragraph 835, the Order states:

> [W]e hope to minimize any administrative problems by encouraging a federal-state partnership whereby together the Commission and the states will assess the entirety of the support mechanisms (25 percent from federal and 75 percent from state mechanisms).

We are concerned that the FCC, in this 25%-75% scheme, could be forcing states to implement a Federally-dictated program. There may be some comfort provided in Paragraph 271. The FCC notes that "we believe the states will fulfill their role in providing for the high cost support mechanisms." The Order adds:

> The Commission does not have authority over the local rate setting process or the implicit intrastate universal service support reflected in intrastate rates.

However, the Order then states that it would just be "premature for the Commission to substitute explicit universal service support for implicit intrastate universal service support" before states have completed their own universal service reforms.

We believe that the FCC should strike this entire section labeled "Scope of the FCC authority over Universal Service," at

pages 414-428. The rationalization of some future action the FCC may or may not take is, at a minimum, unnecessary. The FCC states in the Order, at p. 425, that it would be premature to assess intrastate revenues for the high cost fund at this time. To simply fill in the voluminous order with this dicta and contorted analysis is without any merit.

b. **Legal Framework on Intrastate Discounts for Schools and Libraries**

Similarly, the legal framework on mandating what states must do on their intrastate discounts looks somewhat questionable, in that the Act gives states authority over intrastate discounts. (Section 254(h)(1)(B)). We take some comfort, however, that the Order makes requirements on states only as a condition of receiving Federal support. Clearly, the FCC has no blanket authority as to how states may set their intrastate discount. In Section X on Schools and Libraries, the FCC requires states to establish intrastate discounts at least equal to the discounts on interstate service as a condition of federal universal support for schools and libraries in that state. The FCC acknowledges that the Act authorizes states to determine the level of discounts available to schools and libraries with respect to intrastate services, but concludes that nothing prohibits the FCC from offering to fund intrastate discounts or conditioning the Federal funding "necessary" to achieve certain goals. We simply

ask that the FCC clarify that it is only conditioning the funding of the intrastate portion on the adoption of the Federal matrix.

Thus, we urge that ¶ 550 be re-worded so that the sentence reads:

> We adopt rules providing federal funding for intrastate discounts, as well. However, the federal funding for those intrastate discounts is conditioned on the state's adoption of intrastate discounts at least equal to the discounts on interstate services.

(3) **Income Tax Expense for High Cost Fund**

We believe that the FPSC proposal on income tax expense treatment may have been overlooked, and that we should seek reconsideration of this item. On November 7, 1994, the Florida Public Service Commission (FPSC) filed comments with the FCC in response to a Notice of Inquiry (NOI) issued on August 30, 1994, in CC Docket No. 80-286, to develop information concerning the manner in which the FCC's Part 36 jurisdictional separations rules are used to provide interstate assistance to local exchange companies. Although the NOI did not raise any concerns about income tax expense, we provided comments and our recommended solution on what we believe to be a problem with income tax expense.

On September 8, 1995, the FPSC filed comments in response to a Notice of Proposed Rulemaking (NOPR) and NOI issued on July 13, 1995, in CC Docket No. 80-286, to develop information concerning

the manner in which the FCC's Part 36 jurisdictional separations rules are used to provide interstate assistance to local exchange companies. The NOPR and NOI did not discuss income tax expense. However, we provided comments and our recommended solution on what we believe to be a problem with income tax expense.

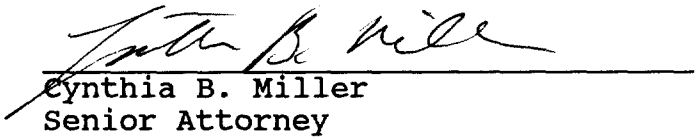
On March 27, 1997, an ex parte letter was filed with the FCC from Julia Johnson, Chairman FPSC, to Reed Hundt, Chairman FCC. Again, the issue concerning the amount of income tax expense which is included in the calculation of loop costs for high cost support was raised and our recommended solution was stated.

The current method of including a portion of book income taxes for calculating high cost support is not appropriate. A carrier which is earning an excessive rate of return will have a high level of income tax expense on its books. Under current rules, that high level of income tax expense is included in a carrier's loop costs and results in an even higher level of costs and high cost support for the carrier. Providing even more high cost support to a carrier which already has excessive earnings is contrary to the goals of the Universal Service Fund. Income taxes related to the return component on investment should be calculated based on the loop investment and the authorized rate of return for each carrier as is done in the calculation of DEM weighting and Long Term Support amounts. This will allow an amount of income tax expense which is appropriate for the amount of investment and rate of return allowed.

Conclusion

Thus, we are seeking reconsideration or clarification in three areas: (1) the FCC framework over eligible telecommunications carriers, which violates section 214 of the Act in that the Act places the states in the implementation role; (2) the interstate/intrastate jurisdicational discussion presented in the high cost fund section and in the schools/libraries section; (3) the treatment of income tax expense for the high cost fund.

Respectfully submitted,



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WASHINGTON D.C. 20554

In the Matter of:	)	
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this 16th day of July, 1997, a true and correct copy of the foregoing Florida Public Service Commission's Petition for Clarification and Reconsideration will be furnished to parties of the mailing list previously used in this docket.

Cynthia B. Miller
Senior Attorney